

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
GALVESTON DIVISION**

UNITED STATES OF AMERICA

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v.

DANIEL ERNEST SMITH,

Defendant.

CRIMINAL NO. G-07-24

**ORDER ADOPTING REPORT AND RECOMMENDATION GRANTING IN  
PART AND DENYING IN PART DEFENDANT'S MOTION TO SUPPRESS**

The court referred the defendant's motion to suppress to the magistrate judge for a report and recommendation. The defendant, Daniel Ernest Smith, is a convicted felon charged with possessing a firearm. He moved to suppress the firearm that is the basis of the indictment and statements he made about the firearm. The magistrate judge conducted an evidentiary hearing on September 28, 2007. At that hearing, the officers who found the firearm and heard Smith's statements testified. Smith's girlfriend also testified. In his thorough report and recommendation issued on November 14, 2007, the magistrate judge denied the motion to suppress the firearm, finding that credible testimony established that the officers' initial confrontation of the defendant and his girlfriend was legal and that the girlfriend voluntarily consented to search the apartment where the pistol was found. The magistrate judge granted the motion to suppress the statements the defendant made about the pistol, however, finding that the statements were made after marijuana had been found in the apartment and the defendant was in custody, but before any *Miranda* warnings were given.

The government filed objections to the magistrate judge's recommendation to suppress the statements and testimonial acts of the defendant after the marijuana had been found in the apartment and the defendant was ordered to stay in the apartment and sit on the apartment couch while the three officers continued a thorough consensual search. This court has considered the objections and made a *de novo* determination of the magistrate judge's recommended disposition. Fed. R. Crim. P. 59(b)(3). The court finds the Report and Recommendation should be, and the same is hereby, adopted as the court's Memorandum and Order. The record supports the magistrate judge's finding and conclusion that when the defendant made the statements and testimonial acts at issue, he was in custody. Because the officers did not give the defendant *Miranda* warnings, the statements he made are not admissible.

Accordingly, it is ordered that the defendant's motion to suppress is denied insofar as it seeks the suppression of the pistol and ammunition seized on January 26, 2007, and granted insofar as it seeks the suppression of the testimonial statements and acts the defendant made. A pretrial conference is set for **January 4, 2008, at 8:45 a.m.**, in Courtroom 11B, at 515 Rusk, Houston, Texas.

SIGNED on December 26, 2007, at Houston, Texas.



Lee H. Rosenthal  
United States District Judge